

## **SEPARATION OF CHURCH AND STATE** **IN HUD PROGRAMS**

The Faith Community has long been one of the leaders in assisting homeless persons and families and in providing affordable housing for poor people, especially special populations like the elderly and disabled. HUD is proud to be a partner in making assistance available for these purposes. But special consideration attends participation by the Faith Community.

The First Amendment to the United States Constitution states that “Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof.” These two purposeful provisions — the Establishment Clause and the Free Exercise Clause — may sometimes seem in tension. Working them out requires careful, principled commitment. For purposes of the role of the Faith Community in HUD assistance programs, the Establishment Clause is generally the requirement that must be addressed.

In decisions going back almost 30 years, the United States Supreme Court has consistently pointed to three principles in carrying out the Establishment Clause. First, government assistance may not be used for religious purposes. Second, the use of government aid cannot advance or inhibit religion in its principal or primary effect. Third, in assuring that these two principles are carried out, there cannot be such an entanglement that government cannot extricate itself from the process. Although in recent years

some members of the Supreme Court have focused on particular aspects of Church/State separation, such as whether the action under review “endorses” religion, the three principles described above remain the controlling law.

The stretching point is invariably the second principle and making sure that government assistance does not advance religion. HUD has long taken the position that in the case of services and food provided to the homeless and other poor people **through** religious organizations, the true beneficiary is the ultimate recipient. Therefore, a church carrying out such services is not the beneficiary and there is no bar to awarding the assistance to and through what the Supreme Court calls a “pervasively sectarian organization,” like a church. (HUD regulations refer to such organizations as “primarily religious entities” or “primarily religious organizations”.)

When HUD implemented this “true beneficiary” theory, it included language by which providers agree not to discriminate on the basis of religion in hiring or in the provision of services, and not to proselytize. That language was suggested by a law firm serving as counsel to the headquarters operations of a national church.

The issue of government aid is more complicated when the assistance is used to improve a structure owned by a religious organization. There, the church is receiving a benefit, namely, the improvement of its real property. This

is a concern, for example, in the section 202 and section 811 programs of housing assistance for the elderly and the disabled, respectively. To avoid the Church/State problem, nonprofit organizations sponsored by churches develop and operate the project. With respect to the homeless and community development block grant (CDBG) programs, HUD designed a lease mechanism to facilitate rehabilitation of church-owned property for HUD program uses. Under this approach, the nonprofit organization leases the structure, or a portion of the structure, from the church and can even contract out with the church to administer the secular activities, such as homeless services or other public services. Sometimes it may not be in the economic interests of a religious organization to establish, or otherwise utilize, a nonprofit entity. But when large grants are available and there is a need to follow these requirements, there has been successful partnership between HUD and religious providers.

For some other entities, over a 20-year period HUD has made determinations that several organizations should not be considered “pervasively sectarian organizations.” Examples include the YMCA and the YWCA. In cases like these, the entity may receive HUD assistance directly for both services and property improvement. Of course, as in all cases, the HUD grant cannot be used for religious purposes.

As indicated above, the other side of the religious component of the First Amendment is the Free Exercise Clause. HUD is sensitive to this branch of the

law. One way HUD helps in this respect relates to issues concerning the occasional and incidental use of community space for religious purposes in federally assisted public housing and section 202 and 811 projects for the elderly and disabled. The general HUD policy is that community space may be made available for purposes of interest to residents, including religious purposes, so long as the space is made available to all residents in the same manner.

HUD looks forward to continuing the shared mission of both government and the churches to lessen the hurt of poverty and homelessness and to move toward eradicating them.